

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERNERO MARTIN SANTEZ OSBORNE,

Defendant-Appellant.

UNPUBLISHED

June 10, 2003

No. 236066

Genesee Circuit Court

LC No. 01-007449-FC

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of two counts of first-degree murder, MCL 750.316, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to separate terms of life imprisonment for each murder conviction and to a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

I

Defendant was charged with the shooting deaths of two male acquaintances in Flint Township. On the morning of September 28, 2000, Genesee County dispatch received a 911 call from one of the victims, Anterio Bethel, indicating that he and another man, Michael McCrady, had been shot in their apartment. At one point in his 911 call, Bethel named the shooter as "Jernero." McCrady was dead when emergency units arrived, and Bethel died while being transported to the hospital. Defendant was subsequently implicated in the killings by his cousin, Charles Thomas, who also knew the victims and allegedly assisted defendant in disposing of evidence after the shootings. Thomas accepted a plea bargain and was a key prosecution witness against defendant at trial.

II

Defendant first argues that comments by the trial court and the prosecutor during voir dire concerning the testimony of an accomplice-witness prejudiced the jury and denied defendant a fair trial. Further, the dismissal for cause on the basis of a juror's view of the credibility of an accomplice-witness compounded the prejudice. We find no error requiring reversal.

A

Defendant failed to preserve this issue for review by raising it before the trial court. Our review is therefore limited to plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture, there must be (1) an error; (2) the error must be plain, i.e., clear or obvious; and (3) defendant must show prejudice, i.e., that the error was outcome determinative. *Id.*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Carines*, *supra* at 763; *Schutte*, *supra* at 720.

B

Defendant's claim is based on questions and comments during voir dire that he contends improperly informed the jury that Thomas' credibility was to be judged as that of any other witness. It is undisputed that the prosecutor and the court queried jurors concerning 1) whether they had any bias or prejudice against the testimony of a witness who had accepted a plea bargain in exchange for testifying, 2) whether that would affect their view of the testimony, and 3) whether they would consider the testimony along with other testimony. It is also undisputed that one juror was dismissed for cause when she responded that she would treat such testimony with suspicion. However, we disagree that the comments and the dismissal established an incorrect standard for judging the testimony of an accomplice witness or created an atmosphere of prejudice that denied defendant an impartial jury and a fair trial. *People v Sawyer*, 215 Mich App 183, 186, 191-192; 545 NW2d 6 (1996); *People v Anderson*, 166 Mich App 455, 462; 421 NW2d 200 (1988).

A trial court is allowed considerable discretion in both the scope and conduct of voir dire. *Sawyer*, *supra* at 186. The questions posed in this case were in keeping with the function of voir dire, to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine whether a particular juror has the ability to render a fair and impartial decision. *Id.*; *People v Bell*, 209 Mich App 273, 277-278; 530 NW2d 167 (1995). The prosecutor prefaced his questions with a statement that the jurors would hear testimony from a witness who received a plea agreement from the prosecutor's office and that the trial court would instruct the jury to give that testimony particular scrutiny. We find no plain error in the subsequent questioning to elicit preconceived views or bias concerning such testimony. Defense counsel countered the questions by pointing out that a plea bargain was one of the factors that could be used in evaluating a witness' credibility. Similarly, with respect to the juror that was dismissed, her comments could be viewed as undercutting defendant's claim because she expressed her view that such a witness was not credible and had, in effect, written himself off.

Further, defendant has failed to show that the alleged errors affected the outcome of the trial, and we are not persuaded that any alleged error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings independent of defendant's innocence. *Carines*, *supra* at 763.

The trial court's jury instructions properly directed the jury with regard to evaluating the witnesses' testimony. The trial court twice instructed the jurors that they were free to "accept or reject everything a witness" says and "free to believe all, none, or part of any witness' testimony." The trial court instructed the jury that the lawyer's comments and its own comments could not be considered as evidence. As defendant concedes, the trial court properly instructed the jury on accomplice testimony, cautioning that it should be examined closely and carefully with regard to potential bias, the accomplice's own interest, and whether the accomplice was induced to give false testimony. Contrary to defendant's contention, we cannot conclude that any alleged error during voir dire fatally diluted the subsequent jury instructions. Further, defense counsel emphasized that Thomas had accepted a plea bargain and was not a credible witness, that Thomas testified against defendant to save himself.

Although Thomas was a key witness against defendant, other evidence supported defendant's conviction. Defendant was named as the shooter by the victim on the 911 tape and defendant's fingerprints were found at the scene.

III

Defendant also raises several claims of ineffective assistance of counsel. Because defendant failed to move for a new trial or an evidentiary hearing with regard to his claims, review is limited to mistakes apparent on the record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991); *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

A

To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must overcome a strong presumption that counsel's action constituted sound trial strategy. *Id.* at 302.

B

Defendant claims that defense counsel was ineffective in failing to object to the voir dire questioning and the dismissal for cause. Having found no error with regard to voir dire, as discussed *supra*, we conclude that this claim is without basis. Defense counsel used voir dire to raise questions about the credibility of a witness who testified as part of a plea agreement. Defendant has failed to show that counsel's failure to object was not a matter of trial strategy. *Id.* Moreover, as discussed, *supra*, defendant has failed to show that he was prejudiced by any alleged error. *Toma, supra* at 302-303.

C

Defendant also claims that counsel was ineffective for stipulating to the admission of the 911 tape because the tape was inadmissible under the hearsay exception for a dying declaration, MRE 804(b)(2). We disagree.

Defendant contends the 911 tape was inadmissible because there was no independent verification that the voice on the tape was that of the victim, Bethel. Further, there was no evidence that Bethel believed that death was imminent as required for admission under MRE 804(b)(2).

Defendant's arguments are without merit. The victim identified himself when he called 911 and there was no reason to dispute his identity given the corroborating circumstances at the crime scene. Contrary to defendant's argument, the transcript of the 911 tape supports that Bethel was conscious of impending death, as required for admission of a dying declaration. *People v Siler*, 171 Mich App 246, 251-252; 429 NW2d 865 (1988). Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

D

Defendant argues that he was denied the effective assistance of counsel because counsel failed to move for a *Walker*¹ hearing in regard to defendant's statement to the police that he did not know either of the victims. We disagree.

Defendant made the statement at issue when he asked the police why he was at the police station. Defendant was informed that he was there in regard to the murders of Bethel and McCrady, to which defendant responded that he did not know either of them. The court ruled that the statement was admissible under MRE 801(d)(2) as an admission by a party opponent. See *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

Defendant's claim that counsel erred in moving for an evidentiary hearing concerning the admissibility of the tape is without merit. Defense counsel presented his argument to the court and sought suppression of the statement. The trial court rejected counsel's arguments, finding that the statement was not the product of a custodial interrogation. Counsel is not required to advocate a meritless position. *Snider, supra* at 425. Further, defendant has failed to show that any alleged error was prejudicial. *Toma, supra* at 302-303. As defendant observes, the statement could be viewed as completely innocent, since defendant asserts that he knew the victims only by their nicknames, and is unlikely to have affected the outcome.

E

Defendant claims that counsel was ineffective for failing to conduct reasonable investigations into critical facts and failing to call known alibi witnesses. We disagree.

In particular, defendant contends that counsel should have secured photographs of bloody footprint impressions at the crime scene to compare them to his foot size and that he should have investigated activity on McCrady's credit card on the day of the murders. Defendant's assertions that this evidence was exculpatory is mere conjecture. Moreover, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial

¹ 374 Mich 331; 132 NW2d 87 (1965).

strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and defendant has failed to overcome this presumption.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Kirsten F. Kelly